No. 80-966

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In the Supreme Court of the United States

OCTOBER TERM, 1980

HELEN SMITH, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE UNITED STATES NATIONAL BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in dismissing three lawsuits brought by petitioner for want of prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A20-A21) is not reported. The opinions of the district court of March 24, 1977 (Pet. App. A2-A4), and October 11, 1979 (Pet. App. A15-A19), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1980. A petition for rehearing was denied on September 15, 1980 (Pet. App. A23). The petition for a writ of certiorari was filed on (Monday) December 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns three different suits brought by petitioner against several defendants for breach of contract

and to foreclose on three mechanics' liens. The agreements on which the lawsuits are based were between petitioner and the Westgate California Corporation ("Westgate"), which was being reorganized under Chapter X of the Bankruptcy Act at the time the suits were brought, for the performance of interior decorating services (Pet. 2).[1] Action No. 74-267-E was filed on April 26, 1974, to enforce petitioner's claim for materials furnished to certain properties owned by Westgate subsidiaries. Action No. 74-506-E was filed on September 20, 1974. The property subject to the lien in that suit had by that time been transferred to California Little America Corporation, a non-Westgate corporation. Action No. 74-507-E was filed on September 20, 1974, to enforce petitioner's claim for designer fees against the same properties that were the subject of Action No. 74-267-E. The suits were originally brought in San Diego Superior Court but, on the petition of respondent (the receiver), they were removed to the United States District Court for the Southern District of California. Except for propounding seven interrogatories in June 1975, petitioner has taken no action to prosecute these suits (Pet. App. A15-A17).[2]

On February 26, 1974, petitioner was restrained from prosecuting claims against Westgate and its subsidiaries by a blanket restraining order entered by the reorganization court. These orders in no way applied to the other individuals and corporations, including respondent, who were named as defendants in these actions. On July 9, 1974, the district court enjoined petitioner from taking any action

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[1]The relationship between petitioner and Westgate, whose chief executive officer was petitioner's husband, also spawned separate lawsuits concerning the ownership of certain furnishings once located in the Westgate Hotel. See 594 F. 2d 242 (9th Cir.), cert. denied, 444 U.S. 832 (1979).

[2]Respondent pursued several avenues of discovery, to which petitioner responded only after being ordered by the court to do so (Pet. App. A17).

against the Westgate subsidiaries in Action No. 74-267-E (Pet. 3; Pet. App. A17). On July 13, 1976, the interests of the Westgate subsidiaries in the property subject to foreclosure in Action Nos. 74-507-E and 74-267-E were transferred to and vested in respondent.

2. On December 13, 1976, the district court *sua sponte* ordered petitioner to show cause why these actions should not be dismissed pursuant to Local Rule 10 due to lack of prosecution.[3] A hearing was held on January 3, 1977. On March 17, 1977, the district court entered an order dismissing the actions for lack of prosecution (Pet. App. A1). Petitioner moved for relief from judgment under Rule 60(b), Fed. R. Civ. P. On May 25, 1977, after briefing and oral argument, the court denied the motion (Pet. App. A2-A4). In its decision, the court noted petitioner's failure to advance the actions toward discovery and trial; the possibility of prosecuting the actions relating to the liens against the properties owned by Westgate subsidiaries after those properties were transferred to respondent in July 1976; and the substantial detriment to the defendants due to the length of time the actions remained dormant on the court's docket (*id.* at A3).

Petitioner appealed from the dismissals and the denial of the Rule 60(b) motion. After consolidating these appeals, hearing argument and requesting and receiving a stipulated statement of chronology (Pet. App. A6-A12), the court of appeals remanded the actions to the district court for the purpose of entering findings of fact and conclusions of law (Pet. App. A13-A14).

On October 11, 1979, the district court entered findings of fact and conclusions of law in support of its decision to dismiss the actions (Pet. App. A15-A19). The court con-

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[3] Local Rule 10 authorizes the district court to dismiss a lawsuit for want of prosecution once six months has passed without any action. See Pet. 1 n.2.

cluded that petitioner was never constrained in her ability to pursue Action No. 74-506-E and, moreover, was always able to pursue the other actions against the non-Westgate defendants. In addition, after July 1976, petitioner was no longer bound by any restraining order even in the other two actions. Because petitioner had been unreasonably dilatory in prosecuting the actions, which delay had caused and would continue to cause injury to the defendants, the actions were dismissed under Local Rule 10 (*id.* at A18-A19).

The court of appeals affirmed (Pet. App. A20-A21). The court found that the findings regarding petitioner's " 'dilatory and uncooperative conduct' " were amply supported by the record (*id.* at A21). The court also specifically rejected petitioner's contention that she could not prosecute her claims as to the non-Westgate defendants while the restraining order as to Westgate was in effect, characterizing the contention as "meritless" (*ibid.*). Ruling that the "district court's finding of continuing prejudice to the defendants was supported by the record and demanded decisive action by the court," and that "no reasonable alternative to dismissal was available," the court concluded that the district court had not abused its discretion in dismissing the actions (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 9-22) that the district court abused its discretion in dismissing petitioner's actions for want of prosecution. This contention is without merit. Moreover, because petitioner's objection is essentially that the courts below erroneously applied well-settled principles of law to the facts of this case, review by this Court is unwarranted.

As this Court has recognized, a district court has the authority to dismiss an action for want of prosecution, and that dismissal should be reversed only for an abuse of

discretion. *Link* v. *Wabash R.R.*, 370 U.S. 626, 629-634 (1962). See also, *e.g.*, *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *Alexander* v. *Pacific Maritime Association*, 434 F. 2d 281, 283 (9th Cir. 1970). The district court must consider all the circumstances of the case in deciding whether dismissal is appropriate. Thus, in *Link*, although the event that finally triggered the dismissal was plaintiff's counsel's failure to attend a pretrial conference, the Court made it clear that the dismissal was appropriate because the district court "relied on *all* the circumstances that were brought to its attention" (370 U.S. at 634 (emphasis in original)), which indicated that petitioner had been deliberately proceeding in a dilatory fashion. 370 U.S. at 633-635.[4]

The courts below correctly considered all the circumstances surrounding the delay here and explained the basis for the decision to dismiss the actions.[5] Petitioner made virtually no attempt to prosecute these lawsuits and took no steps at all after June 1975, even though there was no bar to proceeding.[6] As in *Link* (370 U.S. at 634-635 n.11), petitioner responded to discovery requests in a dilatory fashion (Pet. App. A17). Finally, the district court found that the "[d]efendants, and particularly [respondent], have and will

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[4]These circumstances included the age of the litigation and the plaintiff's grudging response to discovery requests. 370 U.S. at 633-635 nn. 9, 11.

[5]Indeed, unlike in *Link* (370 U.S. at 632), petitioner here was provided with notice and a full opportunity to be heard.

[6]Petitioner's claim that the restraining order prevented her from proceeding against the non-Westgate defendants because Westgate was an indispensable party was rejected by the court of appeals as "meritless" under California law (Pet. App. A21). In any event, this claim does not explain petitioner's failure to prosecute Action No. 74-506-F, in which the subject property was held by a non-Westgate corporation, or the other actions after July 1976 when respondent took over the properties subject to those actions.

continue to be prejudiced by the failure of [petitioner] to prosecute these actions in a timely manner" because of the continuation of the liens and the increased difficulty in putting forth evidence against the claims (*id.* at A18). The court of appeals held that this finding of prejudice was "amply supported by the record," and noted as well that resolution of the related receivership proceeding continued to be impeded by these actions (*id.* at A21). Thus, the district court followed the guidelines set down by this Court in *Link* and did not abuse its discretion in dismissing the actions.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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[7]Contrary to petitioner's contention (Pet. 9-14), the standards applied by the courts below do not conflict with decisions of other circuits. Rather, the cases cited by petitioner simply reflect different fact situations that did not involve the steady course of dilatory conduct involved here. See, *e.g.*, *Tolbert* v. *Leighton*, 623 F. 2d 585 (9th Cir. 1980) (only evidence of delay was failure to attend pretrial conference).